

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVE JOHNSON,	§
	§ No. 143, 2011
Defendant Below-	§
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 9801004607
Plaintiff Below-	§
Appellee.	§

Submitted: July 11, 2011

Decided: September 8, 2011

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 8th day of September 2011, upon consideration of the appellant's opening brief, the State's motion to affirm, and the record below, it appears to the Court that:

(1) The appellant, Steve Johnson, filed this appeal from the Superior Court's sentencing order following his fifth violation of probation (VOP). The State of Delaware has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Johnson's opening brief that his appeal is without merit. We agree and affirm.

(2) The record reflects that Johnson pled guilty in December 1998 to second degree unlawful sexual intercourse. The Superior Court sentenced him on

February 12, 1999 to twenty years at Level V incarceration, to be suspended after serving ten years for seven years at decreasing levels of supervision. In 2007, Johnson was placed on conditional release.¹ In June 2007, the Board of Parole found Johnson had violated the terms of his conditional release and ordered him to complete the Level IV Crest Program, to be suspended upon successful completion of Crest for the balance of his conditional release time to be served at Level IV work release. Thereafter, Johnson was found in violation of the terms of his probation on four additional occasions. All of the violations resulted because Johnson had unaccountable time. On March 2, 2011, following his fifth VOP, the Superior Court sentenced Johnson to serve seven years, which was the balance of his original sentence, at Level V incarceration. This appeal followed.

(3) In his opening brief on appeal, Johnson contends that his due process rights were violated because the Superior Court did not give him the opportunity to challenge the probation report or present mitigating evidence. Johnson also asserts that his counsel at the VOP hearing was ineffective. This Court, however, will not consider a claim of ineffective assistance of counsel for the first time on appeal if that issue has not been decided by the trial court.² Accordingly, we will not review Johnson's claim of ineffective assistance of counsel in this appeal.

¹ Conditional release is the early release of an inmate from incarceration to the community by reason of the reduction of the term of incarceration through an inmate's earned good time credits. *See* DEL. CODE ANN. tit. 11, § 4302(5) (2007). Because conditional release is a form of parole, an inmate who is placed on conditional release is supervised by the Board of Parole. *See* DEL. CODE ANN. tit. 11, § 4348 (2007).

² *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

(4) Moreover, we find no support in the record for Johnson's contention that he was denied due process at his VOP hearing because he was not allowed to challenge the VOP report or offer mitigating evidence. The record reflects that defense counsel conceded that Johnson had violated the terms of his probation by having unaccountable time. In an attempt to mitigate the violation, however, defense counsel offered to the Court that Johnson had had a problem with his host in order to explain why he was found on the street instead of being in home confinement. The Superior Court, however, simply did not accept this explanation as a mitigating factor because of Johnson's extensive history of having unaccountable time while on probation. Under these circumstances, we find nothing to substantiate Johnson's claim of a due process violation.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice